CITATION: Chapadeau v. Devlin, 2019 ONSC 241
COURT FILE NO.: 16-70034
DATE: 2019/01/10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
Remi Chapadeau and Shawn Henderson	)	Remi Chapadeau and Shawn Henderson, Self-represented
Applicants	)	
– and –	)	Christy Allen and Melinda Andrews, for the Respondents Michel Duhamel, Emmy Verdun and Catherine Barnes
Siobhan Mary Devlin, Kathryn Prud'homme, Donald Murphy, Jacques Ferron, Suzanne Ferron, Dale Sheehan, Carol Sheehan, Meredith Porter, Paulus Christianus Maria Wubben, Robert Stanley Smith, Paula Smith, Brian Grant, Tushara Williams, Michel Carbonneau, Stephane Rose, Paul Makdissi, Myra Yazbeck, Allan Taylor, Richard Gourgon, Lina Couture, Chris Dean, Brent Taylor, Risa Taylor, Michel Duhamel, Christine Bray-Duhamel, Melvin Hartman, Joan Rosenberg-Hartman, Wladyslaw Danielak, Maria Danielak, Brian Woodland, Gayla Woodland, Patricia Lamontagne, Marie Athala Bordeleau, Timothy McCunn, Barbara Carol Janik, Jamie Daniel Joseph Turcotte, Deborah Lisa Turcotte, Polly Mary Eden-Walker, Kathleen Lundgren, Steve Furr, Joseph Victor Derraugh, Janet Elizabeth Derraugh, Patricia Mae Allan, David Edward Seibel, Nellie Christina Seibel, Jerzy Jurewicz, Zofia Orlowska-Jurewicz, Julie Elizabeth Anne Hopkins, Dusan Mudric, Stanica Karadzic, James Thomas Strang, Barbara Strang, Michael Harrison, Virginia Harrison, Alvin Beltram, Emmy Christina Verdun, David James Tappin, Roger Paul, Jocelyne Lemery-Paul, Sandra Lee-Morvai,	)	Steve Furr and Kathleen Lundgren, Self-represented

Johanne D'Auray, Catherine Barnes, Lionel Lobo, Paulette Martel, Richard Martel, Ronald Benson, Linda Benson, Eric MacMillan, Susan Major-MacMillan, Francois Gagnon, Suzanne Simard, Jerry Valihora, Judith Cornell, Elizabeth Lynne Johnson, Anthony John White, Simonne White, Jack Hughes, Nicole Butcher, Kevin Goodhue, Monica Goodhue, Artur Oldak, Dorota Oldak, Lousie Larocque, Suzanne Marie Catherine Lapensee, Louise Maguire Wellington, Mirza Mansukh Jahani, Paul Douglas Dickson, Andrew William McCaulay, Sylvana Maria Gatto, Estelle Heron, Addo Boafo, and Nouhad Hammad

Respondents

)
)
) **HEARD:** In writing

DECISION ON COSTS

RYAN BELL J.

Overview

[1] The applicants and the respondents are owners at King's Landing Private, Ottawa. All owners at King's Landing are bound by a co-tenancy agreement. The applicants argued that s. 6.2 of the co-tenancy agreement should be discharged pursuant to s. 61(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, and that s. 6.2 is unenforceable because it is ambiguous, vague, uncertain, and obsolete. In reasons for decision released October 30, 2018 (2018 ONSC 6456 (CanLII)), I confirmed that s. 6.2 of the co-tenancy agreement is valid and enforceable, and dismissed the application.

[2] Michel Duhamel, Emmy Verdun and Catherine Barnes, the members of the co-tenancy committee when the applicants renovated their rooftop terrace, seek their costs of the application on a substantial indemnity basis: (i) against the applicants in the amount of $113,920.01; and (ii) against the respondents Steve Furr and Kathleen Lundgren in the amount of $28,576.50.

[3] I have reviewed the co-tenancy committee's bills of costs (for total fees and for fees said to be attributable to the involvement of Mr. Furr and Ms. Lundgren), the parties' submissions, and the supporting documentation provided by the parties.

[4] The issues I must determine are the following:

(i) the appropriate scale of costs payable by the applicants;

(ii) the quantum of costs payable by the applicants; and

(iii) whether the co-tenancy committee is entitled to a second set of costs against Mr. Furr and Ms. Lundgren.

[5] For the following reasons, I have determined that the co-tenancy committee is entitled to its costs against the applicants, on a substantial indemnity basis, in the amount of $90,000, inclusive of disbursements and HST. I make no award of costs against Mr. Furr and Ms. Lundgren.

Relevant Provisions of the Co-tenancy Agreement

[6] Management of the shared property is addressed in Article 3 of the co-tenancy agreement. Section 3.1 provides that the management and supervision of the maintenance and repair of the shared property is to be exercised by the co-tenancy committee. The specific duties of the co-tenancy committee are also listed in s. 3.1. The qualifications of the co-tenancy committee members are set out in s. 3.3. Section 3.4 addresses the election and term of the co-tenancy committee members.

[7] Section 3.7 of the co-tenancy agreement provides that the co-tenancy committee and officers of that committee are entitled to be indemnified by the other owners from and against:

> a) any liability and all costs, charges and expenses that he sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against him for or in respect of the execution of the duties of his office; and
>
> b) all other costs, charges and expenses that he sustains or incurs in respect of the affairs of the Co-tenancy;
>
> provided that
>
> (i) the Co-tenancy Committee is advised of any such action, suit or other proceeding, or cost, charge or expense, forthwith after the committee member or officer received notice thereof; and
>
> (ii) the Owners are given the right to join in the defence of the action, suit or proceeding.

[8] Article 11 of the co-tenancy agreement deals with indemnification. Section 11.1 provides:

> Indemnification. The Owner shall indemnify and save harmless the other Owners from and against any losses, costs, damage, injury or liability

> whatsoever which any other Owner may suffer or incur resulting from or caused by an act or omission of the Owner…

Issue 1: Scale of Costs Payable by the Applicants

[9] The co-tenancy committee claims substantial indemnity costs on the basis of s. 11.1 of the co-tenancy agreement. The committee also asserts that, apart from the contract, there are reasons why they are entitled to their costs on a substantial indemnity basis.

[10] The applicants concede that the co-tenancy committee was successful and should have its costs, but they submit that those costs should be on a partial indemnity basis and in an amount substantially less than that claimed by the committee. As to the appropriate scale of costs, the applicants assert: (i) the result achieved by the co-tenancy committee was less favourable than their offer to settle; and (ii) the applicants did not engage in reprehensible, scandalous or outrageous conduct so as to warrant an award of substantial indemnity costs.

[11] I am of the view that the language of s. 3.7 and s. 11.1 of the co-tenancy agreement, particularly having regard to the reference to "cost, charge or expense" in the former, and to "costs" in the latter, is sufficient to encompass substantial indemnity costs incurred responding to the application challenging the validity of s. 6.2. Section 6.2 of the co-tenancy agreement is part of the King's Landing building scheme. It confers an ongoing benefit to the community of owners. The legal fees incurred by the committee are "in respect of the affairs of the Co-tenancy."

[12] Therefore, the co-tenancy committee and its members have a contractual claim for substantial indemnity costs. This does not, however, end the inquiry. As the Court of Appeal stated in *Bossé v. Mastercraft Group Inc.* (1995), 123 D.L.R. (4th) 161, at p. 178:

> As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for so doing - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which renders the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances.

[13] In this case, there is no evidence that the co-tenancy committee acted inequitably, unfairly or in any manner that would disentitle it to the court's assistance in enforcing the contractual right. There is also no evidence of any special circumstances which would make it unfair or unduly onerous to require the applicants to pay substantial indemnity costs. I conclude that the applicants are required to pay the co-tenancy committee's costs on a substantial indemnity basis.

[14] In support of their case for substantial indemnity costs, the co-tenancy committee also refers to a number of other factors, including: their complete success, the applicants' refusal of their August 16, 2017 offer to settle, the importance of the issues, the breadth of the allegations

raised by the applicants, other conduct by the applicants alleged to have lengthened unnecessarily the duration of the proceeding, and alleged vexatious conduct by the applicants.

[15] The co-tenancy committee goes further and alleges in its costs submissions that the alleged vexatious conduct engaged in by the applicants was with the intention of "manipulat[ing] and/or influenc[ing] the committee's decision-making respecting the Applicant's renovations." I make no such finding. Based on the materials filed, I have serious doubts as to the relevancy of certain of the committee's allegations; it is not possible to determine the validity of other allegations.

[16] As for the other matters relied on by the co-tenancy committee, whether considered separately or cumulatively, they are not the sort of conduct that would give rise to an order for substantial indemnity costs.

[17] I next consider the offer to settle. While the co-tenancy committee advised on August 16, 2017 that it was prepared to consent to the discontinuance of the application on a without costs basis, the offer was conditional on the removal of privacy walls and certain reinstatement work being completed by the applicants. It cannot be said that the co-tenancy committee obtained a result on the application as or more favourable than the terms of its offer; accordingly, the cost consequences under Rule 49 of the *Rules of Civil Procedure* do not apply.

[18] In summary, the co-tenancy committee shall be paid substantial indemnity costs by the applicants on the basis of s. 3.7 and s. 11.1 of the co-tenancy agreement. There is no reason the contractual right should not be enforced.

Issue 2: Quantum of Costs Payable by the Applicants

[19] In terms of quantum, I agree with the applicants that there should be no recovery for costs associated with the withdrawn notice of application and the preparation of the notice of arbitration. I have also taken into consideration that the motions brought by the applicants relating to service and the naming of respondents were procedural in nature and unopposed.

[20] At the January 12, 2018 case conference, the applicants and the co-tenancy committee agreed to abandon their competing motions and the applicants agreed to amend and limit their application to a determination of the validity of s. 6.2 of the co-tenancy agreement. While the co-tenancy committee appears to be seeking its costs associated with these motions, the order made at the case conference reserves only the costs of Mr. Furr and Ms. Lundgren associated with the abandoned motions to the application judge.

[21] The applicants take issue with the attendance of two counsel on behalf of the co-tenancy committee at the cross-examinations and the hearing. I cannot say that the time spent by counsel was manifestly unreasonable or that the matter was "over-lawyered" having regard to the importance of the issues raised for the community, the breadth of the applicants' allegations, and the result achieved.

[22] The applicants' argument that the costs of the co-tenancy committee members should be limited to their share of the costs as individual owners is devoid of merit. It flies in the face of

the principle of indemnification of the co-tenancy committee and its officers as set out in the co-tenancy agreement.

[23] In my view, taking into consideration all of the matters discussed above as well as the Rule 57.01 factors, a fair and reasonable award would be $90,000 in costs, on a substantial indemnity basis.

Issue 3: Second Set of Costs

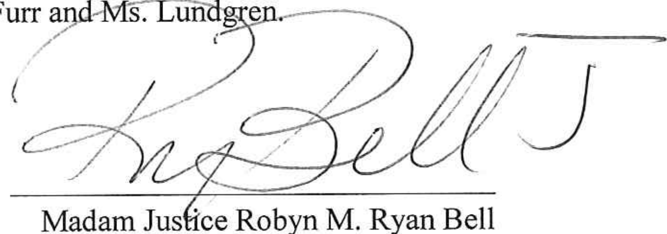
[24] In my view, there is no basis for costs to be awarded against Mr. Furr and Ms. Lundgren. These respondents were named by the applicants; they did not initiate proceedings against the co-tenancy committee. Mr. Furr and Ms. Lundgren did not execute a consent to permit the co-tenancy committee to represent their interests as owners for the purpose of the application. They were not required to do so.

[25] While the co-tenancy committee submits that the involvement of Mr. Furr and Ms. Lundgren "unnecessarily complicated" the scheduling of the application, counsel for the co-tenancy committee conceded at the November 15, 2017 case conference that the failure to serve Mr. Furr and Ms. Lundgren in accordance with a previously set timetable was an oversight. At the January 12, 2018 case conference, all parties agreed to the revised timetable for the hearing.

[26] In the end, Mr. Furr and Ms. Lundgren did not file a record on the application. They did not participate in the cross-examinations. They made no submissions at the hearing. I find no conduct on the part of Mr. Furr and Ms. Lundgren that would attract a second set of costs in favour of the co-tenancy committee.

Disposition

[27] Mr. Duhamel, Ms. Verdun, and Ms. Barnes are entitled to their costs against the applicants on a substantial indemnity basis in the amount of $90,000, inclusive of disbursements and HST. There will be no order as to costs against Mr. Furr and Ms. Lundgren.



Madam Justice Robyn M. Ryan Bell

Released: January 10, 2019

CITATION: Chapadeau v. Devlin, 2019 ONSC 241
COURT FILE NO.: 16-70034
DATE: 2019/01/10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Remi Chapadeau and Shawn Henderson, Applicants

-AND-

Siobhan Mary Devlin, et al, Respondents

DECISION ON COSTS

Ryan Bell, J.

Released: January 10, 2019